Filed 4/9/10 P. v. Purdy CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KYLE GENE PURDY,

Defendant and Appellant.

F057111

(Super. Ct. No. 1085035)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Donald E. Shaver, Judge.

Mark Shenfield, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

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On December 7, 2004, Kyle Gene Purdy hijacked two cars, drove into several other cars, and drove toward a peace officer on foot and into a pursing patrol car before he surrendered. Pursuant to a negotiated plea agreement, he pled no contest to multiple

crimes and admitted four prison-term priors. On appeal, he argues prejudice from the court's (1) denial of his *Marsden*[1] motion and (2) imposition of consecutive terms and failure to strike any of his prison-term priors. We affirm.

BACKGROUND

On March 24, 2006, the district attorney charged Purdy by information with four counts of attempted willful, deliberate, and premeditated murder (counts 1-4; Pen. Code, §§ 187, 664);[2] one count of assault with a deadly weapon on a peace officer (count 5; § 245, subd. (c)); two counts of assault with a deadly weapon (counts 6-7; § 245, subd. (a)(1)); two counts of carjacking (counts 8-9; § 215); three counts of hit and run with injury (counts 10-12; Veh. Code, § 20001); and one count of evading a peace officer (count 13; Veh. Code, § 2800.2, subd. (a)). The information alleged, as to the four attempted murder counts, personal use of a deadly weapon (§ 12022, subd. (b)) and, as to all 13 counts, service of four prior prison terms (§ 667.5, subd. (b)).

On September 6, 2007, pursuant to a negotiated plea agreement, Purdy pled no contest to two counts of assault with a deadly weapon on a peace officer (lesser included offenses of two former counts of attempted willful, deliberate, and premeditated murder) (counts 1-2; § 245, subd. (c)), three counts of assault with a deadly weapon (lesser included offenses of two former counts of attempted willful, deliberate, and premeditated murder and of one former count of assault with a deadly weapon on a peace officer) (counts 3-5; § 245, subd. (a)(1)), and to all eight other counts as originally charged (counts 6-13) with a lid of 19 years and eight months in prison.

On October 4, 2007, the court sentenced Purdy to 19 years and eight months in prison – a six-year term (the midterm) on one carjacking (count 8); a consecutive two-year term (one-third-the-midterm) on the other carjacking (count 9); a consecutive one-

[1] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[2] Later statutory references are to the Penal Code unless otherwise noted.

year term (one-third-the-midterm) on each assault with a deadly weapon (counts 3-7); a consecutive one-year-four-month term (one-third-the-midterm) on each assault with a deadly weapon on a peace officer (counts 1-2); a concurrent two-year term on each hit and run with injury (counts 10-12) and on the evading a peace officer (count 13); and a consecutive one-year term on each of the four prior-prison-term enhancements. On February 17, 2009, the court granted his request for a certificate of probable cause.

DISCUSSION

1. Denial of Marsden *Motion*

Purdy argues prejudice from the court's denial of his *Marsden* motion on August 28, 2007. The Attorney General argues the contrary.

At the hearing on the motion, Purdy summarized the attorney-client conflict he perceived as "no communication regarding defense strategy." Among his concerns were "[n]o contact with the investigator," "[n]o discovery after being told multiple times that [his attorney] would get to me at the jail," and failure to "file motions and/or requests regarding case after promising to do so."

Elaborating, Purdy told the court his attorney had not asked him "who I wanted for a witness" or "who my witnesses would be, nothing concerning my trial whatsoever." He said he had asked his attorney "to get medical records of me as a child" showing he had "slow learning therapy," saw a psychiatrist, and took medications for mental illness. Additionally, he said he had not "even been granted my discovery yet," had asked his attorney "to subpoena [a witness's] phone records," and had "waived time over six months ago for [his attorney] to see another doctor and investigator. It hasn't been done."

Purdy's attorney acknowledged he had not copied "all of his discovery. It's six volumes and three ring, one-and-half-inch ring binders. I'm not going to go through the trouble of redacting all those pages and copy them and take them down here." He said he

had told Purdy he "was going to bring those tapes over if I located a tape recorder that I could take into the jail" but acknowledged, "That hasn't been done, that much I'll say." He said he had conferred personally with Purdy half a dozen or so times while in custody. Purdy acknowledged his attorney was "always available. I'll concede that point. He's taken all my phone calls. He will talk to me."

As to the investigator, Purdy's attorney said he "worked with an investigator on this case" but the investigator "hasn't taken it" so he "might have to get another one. He didn't want to work personally with Mr. Purdy." He said he was working to get another investigator and was hoping the change would not affect his readiness for trial since no significant investigation was left to be done.

As to motions not made, Purdy's attorney recalled, "There was one. I forget which one it was." He said he was "not in the habit of filing motions unless we got good grounds." He added, "And every client I get wants me to file every damn motion under the sun. I'm not going to do that."

As to witnesses at trial, Purdy's attorney referred to the constitutional right to self-representation that Purdy alternately chose to exercise and not to exercise during a period of time starting well over a year earlier and ending only after his *Marsden* hearing: "This *Faretta*[3] thing has been going on for two weeks now, so, no, I haven't." His attorney agreed that he had to spend time with Purdy to discuss witnesses, acknowledged that he was "probably a good week behind the power curve," and said that he anticipated no problems. As to medical records, he said he "probably could have subpoenaed them" but saw no reason to do so since his "chief witness in that respect" was going to cover the issue "really well."

Another issue Purdy raised was a peremptory challenge. He told the court his attorney "said he would look into" one but also said "there was time limitations on that

[3] *Faretta v. California* (1975) 422 U.S. 806.

motion and couldn't do it." Purdy told the court, "There ain't no six-month time limitation on it." The court dismissed the issue as "untimely."

Asked by the court if he had anything else to say, Purdy replied in the negative. The court informed him there was "no legal requirement that you have a copy of everything your attorney has." The court characterized his attorney's efforts as "doing the best to share the information with you." Finding that his attorney "is providing an adequate defense" with "no conflict of interest or irreconcilable conflict that would create any sort of ineffective representation," the court denied his *Marsden* motion. "The bottom line," the court noted, "your attorney is putting together a fair amount of evidence and some persuasive witnesses, and he's got a good strategy going."

Only if the record "clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result" does the court have the duty to grant a *Marsden* motion. (*People v. Smith* (2003) 30 Cal.4th 581, 604.) Only if "the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel" can the reviewing court find the abuse of discretion that is the sine qua non of relief on appeal. (*Ibid.*) Our review of the court's careful inquiry at the hearing on Purdy's *Marsden* motion satisfies us that the requisite showing of an abuse of discretion is lacking.

2. Consecutive Terms with Prison-Term Prior Enhancements

Purdy argues prejudice from the court's imposition of consecutive terms and failure to strike any of his prison-term priors. The Attorney General argues the contrary.

With commendable candor, Purdy acknowledges the court "properly found some of the aggravating factors" in the applicable Rule of Court since he "did have numerous prior convictions, he was on parole at the time of the incident, and his prior performance on parole was poor." (Cf. Cal. Rules of Court, rule 4.421.) He challenges the court's

finding of some other aggravating factors like "great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness" and "attempted or actual taking or damage of great monetary value." (Cal. Rules of Court, rules 4.421(a)(1), 4.421(a)(9).) However, "California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term for an enhancement." (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.)

Additionally, the law is settled that section 669 "grants the trial court broad discretion to impose consecutive sentences when a person is convicted of two or more crimes." (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458, citing, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 349 (*Scott*).) So, too, the law is settled that "multiple offenses committed against multiple individuals are distinctively worse than multiple offenses committed against a single individual." (*People v. Leung* (1992) 5 Cal.App.4th 482, 504; see also *People v. Calhoun* (2007) 40 Cal.4th 398, 408.) Purdy's crime spree not only victimized nine adults in the crimes to which he pled but also terrified the children in the cars of two of those victims. The abuse of discretion standard of review governs his challenge to the court's imposition of consecutive terms. (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) The record shows no abuse of discretion.

Purdy's negotiated plea agreement reserved his right to challenge the court's imposition of consecutive terms, and he did so at the probation and sentencing hearing, but in both respects the record shows the contrary as to his prison-term priors. Since "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal," he forfeited his right to appellate review of the court's failure to strike any of his prison-term priors. (*Scott, supra*, 9 Cal.4th at p. 356.)

Even if Purdy had not forfeited his right to appellate review, the only mention of his complaint about the court's failure to strike any of his prison-term priors is in the

heading of his sentencing argument. He fails to cite to any authority in support of, let alone argue, his complaint. (Cf. Cal. Rules of Court, rules 8.204(a)(1)(B), 8.360(a).) We have no duty to consider a complaint improperly developed or presented and interpret his casual treatment of the issue as a lack of reliance on his complaint. (*In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, fn. 7; *In re David L.* (1991) 234 Cal.App.3d 1655, 1661.)

Finally, even if we were to consider Purdy's complaint about the court's failure to strike any of his prison-term priors, the burden is on the party attacking the sentence "to clearly show that the sentencing decision was irrational or arbitrary" under the applicable abuse of discretion standard of review. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) He fails to carry his burden.

DISPOSITION

The judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Ardaiz, P.J.

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Levy, J.